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BEFORE THE

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Federal Communications Commission

WASHINGTON, D.C.

In the Matter of:	)	***MM Docket No. 98-35***
	)	
1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	

To: The Commission

COMMENTS OF CONNOISSEUR COMMUNICATIONS PARTNERS, L.P.

Respectfully submitted,

CONNOISSEUR COMMUNICATIONS PARTNERS, L.P.

David M. Hunsaker
PUTBRESE HUNSAKER & TRENT, P.C.
100 Carpenter Drive, Suite 100
P.O. Box 217
Sterling VA 20167-0217

(703) 437-8400

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Comes now CONNOISSEUR COMMUNICATIONS PARTNERS, L.P. ("CCP"), by Counsel and pursuant to Section 1.415(a) of the Rules (47 CFR §1.415(a)), hereby respectfully submits these Comments in response to the Commission's *Notice of Inquiry*[1] in the above-captioned proceeding. In support whereof, the following is shown.

I. STATEMENT OF INTEREST

1. CCP is a Delaware limited partnership that is a the 99% equity holder of a number of limited partnerships which, in turn, hold radio broadcast licenses.[2] The

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[1]FCC 98-37, released March 13, 1998; 63 F.R. (3/31/98). (hereafter, "*NOI*")

[2]The Licensee limited partnerships are currently as follows:

a. **Connoisseur Communications of Canton, L.P.**, *Licensee* of Radio Station WRQK (FM), Canton, OH, and WSOM (AM) and WQXK (FM), Salem, OH.
b. **Connoisseur Communications of Evansville, L.P.**, Licensee of WGBF (AM) and WYNG (FM), Evansville, IN, WGBF-FM, Henderson, KY, and WTRI (FM), Mt. Carmel, IL. CCE is also Time Broker for WDKS (FM), Newburgh, IN.
c. **Connoisseur Communications of Flint, L.P.**, Licensee of WFDF (AM), WDZZ (FM), and WWCK AM-FM, Flint, MI, and WOAP-WRSR, Owosso, MI.
d. **Connoisseur Communications of Quad Cities, L.P.**, Licensee of KJOC (AM), Davenport, IA, WXLP (FM), Moline, IL, KBOB (FM), Muscatine, IA, KORB (FM), Bettendorf, IA, and KQLI (FM), DeWitt, IA.
e. **Connoisseur Communications of Rockford, L.P.**, Licensee of WXXQ (FM), Freeport, IL, and WROK (AM) and WZOK (FM), Rockford, IL.
f. **Connoisseur Communications of Waterloo, L.P.**, Licensee of KOEL (AM) and KOEL-FM,

(continued...)

sole general partner of CCP is Continuity Partners, L.P., a Delaware limited partnership, which, in turn, has three general partners: Connoisseur, Inc., Tinicum D.C.R., Inc. and ABRY/Continuity, Inc.,[3] all Delaware corporations.

2. As the derivative owner of a number of radio broadcast licensees, CCP has a direct interest in the outcome of this proceeding, and any new or modified rules adopted as a result. CCP supports the adoption of policies by the Commission that would promote diversity through the lifting of artificial barriers on the ownership and control of electronic communications entities which current inhibit the full and robust exercise of freedom of expression by these entities. Specifically, CCP supports the elimination or substantial relaxation of the current Radio-Television Cross-ownership (or "One-to-a-Market") Rule.[4]

3. In turn, CCP would oppose the adoption, by the Commission, of any new policies or rules that would constitute greater restrictions on the ability of licensees to acquire and operate broadcast properties in a local market.[5] It is CCP's position that the Commission is without authority, and lacks expertise to revise the radio local ownership rule by employing new or additional processing criteria different from that set forth in §73.3555(a), or by completely reworking its definition of a "radio market." More important, there is no need to adopt such modifications for the purpose of

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[2](...continued)
Oelwein, IA, KKCV (FM), Cedar Falls, IA, and KCRR (FM), Grundy Center, IA.

g. **Connoisseur Communications of Youngstown, L.P.**, Licensee of WBBW (AM), WHOT-FM, Youngstown, OH, and WPIC (AM) and WYFM (FM), Sharon, PA.

[3]Principals of ABRY/Continuity, Inc., through other derivative entities, hold both radio and television licenses in a number of markets.

[4]47 C.F.R. §73.3555(c)

[5]*See NOI, supra.*, ¶¶17-23.

slowing the pace of media "consolidation" whether to maintain competition,[6] to increase minority ownership and participation in the broadcast industry, or some other purpose.

4. If there is a decline in the percentage of radio stations owned by minorities, that fact is not due to the consolidation permitted by the Telecommunications Act. Rather, it is a result of the elimination by Congress, at approximately the same time, of the significant tax incentives to sellers to sell to minority groups by the issuance of tax certificates. If the Commission is serious about increasing minority ownership in the broadcast media, it should petition Congress to reinstate the tax certificate policy—with sufficient safeguards against the kind of abuse that led to its repeal in 1995.

II. THE ONE-TO-A-MARKET RULE SHOULD BE ELIMINATED

5. CCP supports the elimination of the One-to-a-Market Rule. It is outmoded and inconsistent with the present realities of the media marketplace.

6. At present, the rule prohibits the common ownership of a television and radio station in the same market. Waiver of the rules is routinely granted by the Commission if the affected stations are in the top 25 television markets and where, after the merger, there would remain at least 30 independently owned broadcast voices.[7] Section 202(d) of the Telecommunications Act of 1996 directed the

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[6]While it could be argued that more consolidation automatically means less competition, such is not necessarily the case. In fact, only a short time ago the Commission's Mass Media Bureau expressed grave concern over the number of AM and FM radio stations that were off the air due to economic hardship—a result of the excessive and unwise channel proliferation policies, such as Docket 80-90, adopted by earlier Commissions.

[7]*See NOI, supra.*, ¶9. The Commission noted that the One-to-a-Market Rule is the subject of other pending proceedings, in MM Docket Nos. 91-221 and 87-8. *Id.* ¶9, at n. 13.

Commission to extend its presumptive waiver policy to the top 50 television markets if it finds that doing so would be in the public interest.[8]

7. Because the Commission has indicated that it is not seeking additional comments on the One-to-a-Market Rule because it is already the subject of on-going rule-making proceedings, CCP will not address this issue at length. However, the point should be made that modification of the waiver policy from the top 25 to the top 50 television markets is an inadequate response to §202(h) of the Telecom Act. The realities of the media marketplace today make such restrictions unnecessary[9] and artificial restraints on the ability of certain entities to compete while other entities have no such restrictions. If the Commission is truly interested in promoting *competition*, it must eliminate outdated cross-ownership restrictions and level the playing field.[10] Accordingly, the One-to-a-Market Rule should be eliminated,[11]

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[8] *Id.*

[9] As the Commission is well aware, grandfathered radio-TV combinations seldom have integrated operations except for general and administrative. Ironically, in Rockford, Illinois, the Commission staff exacted from ABRY and Connoisseur a promise of joint cooperation between the Connoisseur-held radio stations in that market and the television station proposed to be acquired by a separate ABRY-controlled entity.

[10] The proposed merger of the dominant long distance carrier and a large MSO is only the most recent example of how, at one end of the spectrum, the Commission can look favorably upon cross-media ownership, yet continues to restrict and micromanage the rules pertaining to ownership of one radio station and one television station. What's wrong with this picture?

[11] If the Commission is concerned about those few "egregious cases," provision can be made in a completely revised §73.3555(b) to permit Radio-Television combinations except in those cases where the subsequent combination would result in the ownership or control of greater than fifty percent (50%) of the *broadcast (i.e., Radio and Television)* media voices in the market.

III. THE LOCAL RADIO OWNERSHIP RULES SHOULD BE MAINTAINED IN THEIR PRESENT FORM

8. As part of the present inquiry, the Commission has asked whether there should be any modification of its rules governing local radio ownership[12] in light of, *e.g.*, the consolidations that have taken place over the last two years and the relative decline in the number of minority-owned radio facilities.[13] It is CCP's position that modification of the local radio ownership rule is neither authorized nor warranted.

A. THE COMMISSION IS WITHOUT AUTHORITY TO MODIFY THE LOCAL RADIO OWNERSHIP RULE.

9. The Commission lacks authority to modify the local radio ownership rules by adding further restrictions or processing criteria. The same act of Congress that authorized the instant biennial review also directed the Commission to revise its local radio ownership rules in a very precise way. Those revisions were the result of numerous considerations and compromises among the Conference Committee members of the House and Senate that worked out the final language to the Telecommunications Act of 1996. It is unlikely that it was Congress's intent that the Commission adopt more, rather than less restrictive measures only two short years later.

10. Moreover, the authorization and directive to the Commission under Section 202(h) of the Telecommunications Act of 1996 to conduct biennial reviews of its broadcast ownership rules clearly contemplates that *unnecessary* ownership regulations be *eliminated* –not that new and more restrictive and complex regulations be adopted. It is for this reason that CCP respectfully submits that the Commission is without authority to develop a new scheme of local ownership regulation that includes

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[12] 47 CFR §73.3555(a).

[13] *NOI, supra*, ¶¶17-23.

additional factors such as listening audience percentages, or shares of local radio advertising revenues.[14] It is also clear that Congress intended that the Commission to use its current definition of a radio "market," and not adopt a different method dependent, in whole or in part, upon the availability of proprietary audience research data or share of national and local advertising revenues.

B. MODIFICATION OF THE LOCAL RADIO OWNERSHIP RULE AT THIS TIME IS BOTH UNWARRANTED AND UNWISE.

11. Even if it has the authority from Congress to make substantial modifications to §73.3555(a), a matter clearly under dispute,[15] attempts to reintroduce consideration of audience ratings or shares of advertiser revenues is unwise and unwarranted. The Commission lacks expertise in the area of economic analysis of market power, and other agencies of the federal government can and do engage in such activity.[16] Moreover, the Commission's recent experience with administering the "duopoly" rule adopted for radio in 1992, suggests that use of audience research data is both complex and confusing, depriving licensees of the certainty necessary to plan and engage in broadcast transactions,[17] with the resulting waste of time and energy by all concerned in the submitting and processing of ungrantable applications. We should not be doomed to repeat the regulatory mistakes of the past.

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[14] *Cf., NOI,* ¶21 at n. 23.

[15] *See, e.g.,* "Billy Tauzin Takes on the FCC," RADIO BUSINESS REPORT, June 28, 1998, pp. 6-10.

[16] The adoption by the Commission of separate rules and guidelines which differ from those in use by, *e.g.,* the Department of Justice, would lead to confusion, contradiction and delay. And if the same criteria are adopted, there is needless duplication of scarce agency resources.

[17] *see, e.g.,* Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules,* 2 COMMLAW CONSPECTUS pp 21-41 (1994).

12. But more important, no factual basis exists that would warrant a more restrictive limit on local radio ownership. The fact that there has been significant consolidation in the radio industry is hardly a reason for added restrictions. Consolidation is a result that was specifically contemplated by both Congress and the Commission.[18] The resulting decline in the number of independently owned stations is thus no cause for concern. It was both expected and desired as a way to improve the economic health of the radio industry. It has done so. And, while the economic health of the radio industry has improved, that is no reason to go back to a more restrictive rule on local ownership. The four-tiered market approach adopted by Congress in §202(f) of the Telecommunications Act, provides adequate safeguards against "overconsolidation."[19]

13. A second point of inquiry raised by the Commission is whether or not the current local radio ownership rule has thwarted other Commission public interest goals such as increasing the percentage of ownership of broadcast media held by minorities and females.[20] There would appear to be no causal connection between the two. While it may be true that the number of radio stations owned by minorities declined between 1995 and 1997, there is nothing to suggest that opportunities for minorities to

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[18]Indeed, the benefits of such consolidation, including economies of scale afforded by joint operation of two or more stations in a market, was the primary reason cited by the Commission in adopting the 1992 Radio Contour Overlap Rules. *Report and Order*, In re Revision of Radio Rules and Policies, 7 FCC Rcd 2755, ¶2, 70 RR 2d 903 (1992), *recon. granted in part*, 7 FCC Rcd. 6387, 71 RR 2d 227 (1992).

[19]In fact, the pace of radio consolidation has now slowed significantly, clearly demonstrating that there is no need to adopt regulatory countermeasures. *See, e.g.*, "Consolidation Slows Down...," RADIO BUSINESS REPORT, July 13, 1998, p. 6.

[20]*NOI, supra.*, ¶22.

acquire stations that might otherwise have existed were eliminated as a result of consolidation acquisitions.[21]

14. In any event, other means exist that can more directly influence the number of minority-owned stations. It is no coincidence that the period of decline also matches the period of time that the Commission's former tax certificate policy has been repealed by Congressional action. The Commission's own records reveal that this policy when it was in effect, accounted for more broadcast acquisitions by minorities than any other "affirmative action" policy.[22] And, while the Commission is without authority itself to reinstate the tax certificate policy, it can certainly recommend to Congress that it be reinstituted, this time with additional safeguards. Other policies designed to induce sellers to sell to minority buyers and for lenders to provide financial assistance to such groups are possible and more likely to achieve the Commission's stated objective of increasing the percentage of minority ownership in the radio industry.[23]

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[21]The only possible basis for drawing such a conclusion is that the lifting of local ownership restrictions has, by itself, caused such an increase in the valuation of radio stations so as to price them out of reach of undercapitalized minority groups. Such an argument has, in fact been made, despite the fact that station values rose significantly in the 1980's even without the benefit of a relaxed local ownership rule. In any case, it would be a monstrous perversion of public policy and a total breach of the Commission's obligation to act in public interest for it to attempt to artificially lower the market value of radio stations nation wide so as to make them more affordable to minorities.

[22]Unlike the Commission's former comparative hearing policy that permitted a split as between voting control and equitable ownership, the more restrictive requirement of 51% equitable ownership by minorities of the tax certificate policy provided much greater assurance that the entity acquiring the station was not a sham.

[23]Recent Supreme Court decisions suggest that a number of regulatory schemes designed to increase minority ownership and participation as the expense of nonminority citizens simply will not pass Constitutional muster. Policies which in effect constitute "reverse discrimination" are unsound, harmful to society, and in any event, unlikely to be upheld by the Courts.

15. What of female ownership? As the Commission itself has noted, there is a lack a data on the number of females who own all or part of a radio broadcast facility.[24] The Commission could certainly get a rough idea of the percentage of female ownership by reviewing its own ownership records. But even if it is found that female ownership is significantly less than male ownership, that would not warrant adopting a policy that exceeds the Commission's authority to promulgate and could likely to run afoul of the First, Fifth and Fourteenth amendments to the U.S. Constitution.[25] Such blatant attempts to engage in unauthorized, unwarranted, and potentially dangerous social engineering should be discouraged.[26]

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[24]*NOI, supra.*, ¶22, n. 24. CCP would speculate here that a study of the gender of broadcast owners in corporate and related entities would reveal that considerable ownership of the stock is in the name of a husband and wife as joint tenants or owned by females outright.

[25]*Cf., Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The Court struck down the Commission's female ownership comparative preference policy without reaching the Constitutional question. Moreover, a policy judgment made by the Commission that certain societal groups, *i.e.*, minorities and women, are more deserving than others of the right to use the public airwaves, is, at bottom, a content-based restriction of the First Amendment right to freedom of speech.

[26]"Billy Tauzin Takes on the FCC," *supra*, note 15

CONCLUSION

WHEREFORE, the above premises considered, CCP respectfully urges the Commission to eliminate §73.3555(b) of the Rules, the One-to-a-Market Rule. ALTERNATIVELY, the rules should be substantially relaxed to apply only to "egregious cases," as set forth above.[27]

FURTHER, the Commission should refrain from adopting new rules or modifying Section 73.3555(a) with respect to local radio ownership.

Respectfully submitted,

CONNOISSEUR COMMUNICATIONS PARTNERS, L.P.

By: _____
David M. Hunsaker
Its Attorney

July 21, 1998

Law Offices
PUTBRESE, HUNSAKER & TRENT, PC
100 Carpenter Drive, Suite 100
P.O. Box 217
Sterling, Virginia 20167-0217
(703) 437-8400

[27] *See* note 11 *supra*.